IN THE :

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198[illegible]

NO. 80-5715

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SUPREME COURT, U.S.

COLIN H. CLARK,

PETITIONER,

VERSUS

THE STATE OF LOUISIANA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, COLIN H. CLARK, who is now confined in Louisiana State Penitentiary at Angola, Louisiana, asks leave of this Court to file the attached Petition For A Writ of Certiorari to the Supreme Court of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Undersigned counsel is in the process of obtaining an affidavit from the petitioner in support of this motion, which affidavit will be transmitted to this Court within the next ten (10) days. The delay in securing the affidavit has resulted, because the petitioner only decided to seek certiorari on November 10, 1980, the day before the petition was due in this court. In lieu of this affidavit at the present time, the undersigned counsel has attached his own affidavit, which attests to the petitioner's indigency at trial and on appeal to the Supreme Court of Louisiana.

WHEREFORE, petitioner, COLIN H. CLARK, requests that he be granted leave to proceed in forma pauperis in this Court.

DATE: NOVEMBER 10, 1980

RESPECTFULLY SUBMITTED,

RICHARD E. SHAPIRO
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New Orleans, LA 70130
(504) 581-3647

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

COLIN CLARK, Petitioner,

V.

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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COUNSEL FOR PETITIONER

NOVEMBER 11, 1980

QUESTION PRESENTED

Whether the imposition of a death sentence upon the petitioner when there was no evidence or finding that he intended to bring about the death of another person, or that he deliberately took the life of another, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

COLIN CLARK,

Petitioner,

VERSUS

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

The petitioner, COLIN CLARK, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana affirming the conviction and sentence of death. The judgment of the Supreme Court of Louisiana was entered on June 23, 1980, in State of Louisiana v. Colin Clark, No. 66,573, and rehearing was denied on September 12, 1980.

OPINION BELOW

The opinion of the Supreme Court of Louisiana has not yet been reported. The official citation of the opinion is State v. Colin Clark, ____ So.2d ____ (La.1980; No. 66,573). The opinion is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of Louisiana were filed on June 23, 1980. On July 30, 1980, one of the dissenting

justices filed his opinion and, on November 4, 1980, the other dissenting justice filed his opinion. On September 12, 1980, the petition for rehearing was denied by the Supreme Court of Louisiana (Appendix B). On October 24, 1980, the District Court for the Nineteenth Judicial District, Parish of East Baton Rouge, signed a death warrant which set the petitioner's execution date for January 23, 1981 (Appendix C).

This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Louisiana Code of Criminal Procedure:

LA. R.S. 14:26:

Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

If the intended basic crime has been consummated, the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar prosecution for the other.

LA. R.S. 14:455:

Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his co-

defendant. But to have this effect a prima facie case of conspiracy must have been established.

Article 905.3; Article 905.4 (as enacted in 1976); Article 905.4 (as enacted in 1979); Article 905.5; Article 905.6; Article 905.7; Article 905.8; Article 905.9; and Louisiana Supreme Court Rule 28. These Articles and the Supreme Court Rule are set forth in Appendix D.

STATEMENT OF THE CASE

On August 25, 1978, the grand jury for the Parish of East Baton Rouge filed an indictment in the Nineteenth Judicial District for the Parish of East Baton Rouge charging the petitioner Colin Clark with one count of first degree murder in violation of Louisiana Revised Statute 14:30.[1]

Petitioner's trial commenced on August 6, 1979, and on August 9, 1980, after a four-day trial, the jury found the petitioner guilty of first degree murder. The sentencing portion of the bifurcated proceedings commenced on the same day, and after slightly more than an hour of deliberations, the jury recommended that the petitioner be sentenced to death. The jury's recommenda-

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1 At the time of this offense, Louisiana Revised Statute 14:30 specified in pertinent part:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

tion was predicated on its findings of two aggravating circumstances: (1) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;[2] and (2) the offense was committed in an especially heinous, atrocious or cruel manner.[3] The trial judge then sentenced the petitioner to death in accordance with the recommendation of the jury.

The evidence proffered at trial established that the body of Fred Schmidt, the assistant manager of the Red Lobster Inn in Baton Rouge, Louisiana was found in the restaurant in the early morning hours of July 15, 1980 (TR. 204).[4] The autopsy revealed that Mr. Schmidt had been stabbed numerous times and that he had also been shot in the head (TR. 438).[5] Approximately $1800 had been taken from the restaurant (TR.299).

There was no evidence at the trial or the sentencing hearing of who had actually killed Mr. Schmidt or who had actually stolen the money from the Red Lobster Inn. The petitioner, who was employed as a waiter at the Red Lobster Inn, had left the restaurant earlier that evening before completing his shift (TR. 321-322). Later that evening, and prior to the estimated time of the murder, petitioner's car, with two occupants, was observed going in the direction of the restaurant (TR. 456-458). One witness testified that, at this time, a friend of hers shouted "Hey Colin", and the passenger in the car stuck his arm out of the window

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2 Article 905.4(a) (Appendix D at 1)

3 Article 905.4(g) (Appendix D at 2)

4 "TR" refers to the transcript of the proceedings in the Nineteenth Judicial District, Parish of East Baton Rouge, which is presently on file in the Clerk's Office of the Supreme Court of Louisiana.

5 According to the pathologist, two of the knife wounds or the gunshot wound could have been the cause of death (TR. 437). The bullet wound was caused by a .38 caliber revolver (TR. 475).

and waved (TR. 456). However, this friend did not testify at trial, and the witness was unable to determine from her own observations whether the petitioner was in the car (TR. 456). Another employee of the Red Lobster testified that shortly afterwards she saw a car at the restaurant that looked like the petitioner's; however, she couldn't be certain that it was his car (TR. 427-428, 437).

At approximately 4:30 A.M. that morning, the petitioner and Michael Glover arrived at their apartment (TR. 343). Their roomates - Linda Pittman and Rod Reid - testified that they heard various noises after petitioner and Glover had come home, and they left their room to investigate (TR. 344; 376). They then noticed that petitioner and Glover were packing their belongings and that petitioner's hand was badly cut (TR. 344-345; 376). Pittman also observed an unusually large number of bills in Glover's wallet (TR. 378), and Reid testified that he saw a metal strongbox in petitioner's closet (TR. 348).[6]

Petitioner and Glover then drank a bottle of Chevas Regal scotch they had brought into the apartment (TR. 349; 386).[7] After this, they left the apartment, advising their roommates that if anyone asked, Pittman and Reid should say that the petitioner and Glover had left for San Francisco, California, two days earlier (TR. 349; 387).

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6 The manager of the Red Lobster Inn had previously testified that a metal strongbox in which he kept coins was missing from the restaurant after the robbery (TR. 298).

7 Several bottles of Chevas Regal scotch had also been missing from the Red Lobster Inn (TR. 299).

Finally, Pittman and Reid testified that the petitioner owned a butcher knife similar to that found at the scene of the crime (TR. 333; 380) and that Glover possessed a .38 calibar revolver (TR. 382).

The trial court instructed the jury on the elements of first degree murder.[8] Upon request of the prosecution, the trial court also instructed the jury on conspiracy, specifically advising the jurors that "[e]ach coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise" [TR. 607] [brackets supplied].[9]

The petitioner was convicted of first degree murder and sentenced to death. In a separate trial, Michael Glover was also convicted of first degree murder and was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.

The Supreme Court of Louisiana affirmed petitioner's conviction and death sentence, finding that the evidence established a prima facie showing that Glover and the petitioner had been engaged in a conspiracy; therefore, the court concluded that the jury was properly instructed on the law of conspiracy. (Appendix A at 6). The court also determined that petitioner's death sentence was not excessive under pertinent court rules (Appendix A at 14-17).

HOW FEDERAL QUESTION WAS RAISED BELOW

On appeal, the Supreme Court of Louisiana must, pursuant to La.Sup.Ct.R. 28, §1 (Appendix D at 4), review every sentence of death to determine if it is excessive. This review is conducted in a capital case, without regard to objections or assignments of error by the defendant. State v. Sonnier, 379 So.2d 1336, 1371

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8 The pertinent provisions of the first degree murder statute in effect at the time of the offense are reproduced in note 1.

9 The instruction was predicated on R.S. 14:455, which is reproduced in full at pages 2 - 3, supra.

(La. 1979)(on rhg.). Included among the considerations on review of the petitioner's sentence was the proportionality of his death sentence to the penalty imposed in similar cases. Although there was absolutely no evidence or finding that the petitioner intended to kill Fred Schmidt, or that he had deliberately taken the life of another, the court found that the petitioner's death sentence was not disproportionate. (Appendix A at 17).

* * * * * *

REASONS FOR GRANTING THE WRIT

THE IMPOSITION OF A SENTENCE OF DEATH UPON PETITIONER WHEN THERE HAS BEEN NO EVIDENCE OR FINDING THAT HE ACTUALLY KILLED ANOTHER PERSON, THAT HE INTENDED TO KILL OR THAT HE DELIBERATELY TOOK THE LIFE OF ANOTHER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

A critical inquiry under the Eighth Amendment in any capital case, as identified by the prevailing opinion in Gregg v. Georgia, 428 U.S. 153, 187 (1976), is "whether the punishment of death is disproportionate in relation to the crime for which it is imposed". See also, Coker v. Georgia, 433 U.S. 584 (1979). In the circumstances of the present case, the petitioner's sentence is manifestly disproportionate.

Fundamental to any determination of proportionality of a death sentence is an assessment of individual culpability for the crime committed. However, petitioner's jury was not required to undertake this rigorous analysis of the evidence, since the proffered conspiracy instructions permitted the jury to convict petitioner and ultimately sentence him to death without ever finding that he actually, intentionally, deliberately or purposefully took the life of another person. Moreover, the two aggravating circumstances submitted to the jury at the penalty phase; (1) murder committed during the perpetration of a robbery, and (2) murder committed in an especially heinous, atrocious or cruel manner, did not require a finding that the petitioner actually intended to

kill another person or that he deliberately took the life of another. Thus, neither at the guilt phase nor at the penalty phase was any finding made (or any evidence presented) that petitioner deliberately, intentionally, or purposefully acted to take a human life.

The infliction of a death sentence without such a finding is a disproportionate and excessive punishment forbidden by the Eighth and Fourteenth Amendments. In Gregg v. Georgia, supra, the prevailing opinion concluded that, where the crime is "murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." 428 U.S. at 187 (emphasis added). Subsequently, in Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the death penalty is invariably disproportionate and unconstitutional for the crime of rape. The Coker rule plainly applies to any non-homicidal felony. See Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam) (kidnapping and rape).

But where, as in petitioner's case, a first degree murder conviction and death sentence are based exclusively upon a conspiracy theory, with no finding of individual culpability or deliberate murder on the part of the petitioner, the capital sentence rests upon a degree of personal blameworthiness that is indistinguishable from Coker's. True, a death in fact resulted in the instant case, unlike Coker's situation. But it is now settled that the infliction of capital punishment based upon the nature of the offense alone ignores considerations that are "a constitutionally indispensable part of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion). Accord, Lockett v. Ohio, 438 U.S. 586, 602 (1978)(plurality opinion); (Harry) Roberts v. Louisiana, 431 U.S. 633, 636-37 (1977) (per curiam); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 332-34 (1976)(plurality opinion). The unmistakable teaching of these cases is that capital sentencing must depend upon the

offender's individual culpability, not merely the category of crime that is produced by the consequences of his acts. It follows that if the offender's culpability is not appreciably greater than Coker's, the infliction of a death sentence upon him would be both disproportionate and violative of the Eighth Amendment's command that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice". Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion).

The decision to impose a death sentence appears particularly capricious when it is predicated on the conspiracy theory of culpability. First, such instructions have an obvious tendency "to diminish the reliability of the sentencing determination" Beck v. Alabama, ____ U.S. ____, 65 L.Ed.2d.393,403 (1980), for individual responsibility is never fully assessed as part of the factfinding process. This will inevitably lead to arbitrary decisions, such as that evident in the case at bar, where petitioner received a death sentence and Michael Glover, his "co-conspirator" a life sentence, even though there was no finding that either of them had deliberately, purposely or intentionally acted to take a human life.

Moreover, the conspiracy doctrine actually invites the jury to ignore the individual determinations that are so essential to a reliable capital sentencing proceeding. As Justice Jackson perceptively noted more than thirty years ago:

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody.It is difficult for the individual to make his own case stand on its own merits in the eyes of the jurors who are ready to believe that birds of a feather are flocked together.Krulewitch v United States, 336 U.S. 440, 457 (1944) (Jackson, J., concurring).

The same overwhelming obstacles confront a person in petitioner's situation. There was evidence of a murder, but the prosecution had difficulty establishing, without any eyewitnesses, who had been responsible for the killing or even whether the killing

had been intentional or deliberate. Therefore, the conspiracy doctrine was interjected into the factfinding process and permitted the jury to skip over a vital step in the assessment of culpability for the crime. Instead, the jury was able to reason from the fact of a killing that either Glover or petitioner had deliberately, purposely or intentionally acted to take a human life. Consequently,the individual judgment upon which a death sentence should be premised was replaced by a theory of collective guilt that lacked any evaluation of petitioner's personal culpability.

In sum, the jury at petitioner's trial was allowed to take a shortcut to a death sentence, when careful, deliberate consideration is compelled by the Eighth Amendment. The findings or assessments of evidence that are indispensable to a rational capital sentencing proceeding were simply not required at petitioner's trial. As Justice White, the author of the prevailing opinion in Coker, concluded in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 624 (1978):

> "[I]t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."

This fundamental principle was ignored in the case at bar and, as a consequence, petitioner's death sentence cannot be squared with the dictates of the Eighth Amendment.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

NOVEMBER 11, 1980

RESPECTFULLY SUBMITTED

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APPENDIX A

JUN 23 1980

SUPREME COURT OF LOUISIANA

NO. 66,573

STATE OF LOUISIANA

V.

COLIN CLARK

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
HONORABLE CARL A. GUIDRY, JUDGE

MARCUS, Justice

Colin Clark was indicted by the grand jury for the first degree murder of Fred Schmidt on July 15, 1978, in violation of La. R.S. 14:30. After trial by jury, defendant was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The matter was submitted on the evidence of the trial on the issue of guilt without introduction of other evidence. The jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced defendant to death in accordance with the recommendation of the jury. On appeal, defendant relies on twenty-seven assignments of error for reversal of his conviction and sentence.[1]

FACTS

On Saturday, July 15, 1978, at 1:59 a.m., a burglar alarm was set off at the Red Lobster Inn in Baton Rouge, Louisiana. Police arrived at the Inn at 2:05 a.m. and upon entering found the body of Fred Schmidt, the assistant manager of the restaurant. Schmidt had been stabbed approximately thirty to thirty-five times and had been shot once. A pathologist testified that the knife wounds were delivered before the shooting, which produced instant death. Two of the knife wounds would otherwise have been fatal.

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1. Defendant has expressly abandoned Assignments of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 16, 18, 21, 22, 23, 24 and 25. Additionally, defendant has neither briefed nor argued Assignment of Error No. 15. Hence, we consider it to be abandoned. State v. Blanton, 325 So. 2d 586 (La. 1976); State v. Carlisle, 315 So. 2d 675 (La. 1975).

Found next to the body was a butcher knife that according to the pathologist could have been the knife used. A ballistics expert testified that the bullet found was fired from a .38 caliber revolver. Also found at the scene were spots of blood of the same type as that of defendant, two band-aid wrappers and an entry in the manager's log reading "Colin walked out, S.O.B." A metal strongbox, approximately $1,800.00 and two bottles of Chivas Regal scotch were missing.

Defendant had been employed as a waiter at the Red Lobster and had quit earlier that evening. A waitress at the restaurant testified that defendant and the victim had an argument that evening. Three witnesses testified they saw defendant's car at the restaurant or several blocks away driving toward the restaurant immediately prior to the crime. Two of these witnesses also testified they saw two persons in the car. One witness testified a friend with her shouted, "Hey, Colin," when the car passed and the passenger in the car stuck his arm out of the window and waved.

Two of defendant's roommates, Linda Pittman and Rod Reid, testified they were in bed in their room at 4:00 or 4:30 a.m. when defendant and their other roommate, Michael Glover, returned home. Defendant shut the door to Pittman and Reid's room, telling them he had a couple of lady friends with him. When they heard unusual shuffling noises, Pittman and Reid left their room to investigate. Defendant and Glover were packing their belongings. Defendant's hand was badly cut and, according to Pittman, had band-aids on it. Pittman noticed an unusually large number of bills in Glover's wallet. At about 5:30 a.m., after consuming a bottle of Chivas Regal scotch they had brought in with them, defendant and Glover departed, telling Pittman and Reid that if anyone asked, they should say that defendant and Glover left for San Francisco, California, two days before. After they left, Pittman and Reid noticed that a metal strongbox they had seen during the packing was gone. Furthermore, Pittman and Reid both testified defendant owned a knife like that found at the scene of the crime and Glover owned a .38 caliber

revolver, the same type of gun as that used in the murder. Glover was arrested in New York City; defendant was arrested in San Diego, California; his car was found in Tallahassee, Florida.

ASSIGNMENT OF ERROR NO. 5

Defendant contends the trial judge erred in denying his objection to the one thousand dollar limitation placed on the amount he was allowed to expend in his defense. He argues that, due to this limitation, he was unable to hire an investigator and to locate and procure for trial a certain material witness.

On August 3, 1979 (Friday), defendant filed a motion for a continuance due to the "unavailability of necessary out-of-state witnesses." Trial was set for Monday, August 6, 1979. Defendant had been arraigned and counsel appointed some six months earlier. Attached to the motion was an affidavit of counsel which stated that, despite due diligence and effort of counsel, it had only recently come to his attention that the testimony of Dr. Francis H. Hoffman of Mobile, Alabama, was required. The affidavit continued by stating that Dr. Hoffman, a psychiatrist, "would possibly be a necessary defense witness" and that it was "believed by the defense" that he would testify that the crime charged was outside of the personality and psychological makeup of defendant. Counsel further stated that he learned of Dr. Hoffman approximately two weeks before trial.

Immediately prior to the commencement of trial, defense counsel admitted that he had not contacted Dr. Hoffman about his possible testimony. The testimony of another doctor, whose absence was also alleged as a basis for the continuance, was stipulated by agreement of counsel. The trial judge denied the motion for a continuance. Prior to the calling of the first witness, defendant lodged an objection to the dollar limitation placed on the amount he was allowed to expend in his defense. The trial judge noted his objection.

La. Code Crim. P. art. 738 provides that each defendant shall be allowed to summon twelve witnesses at the expense of the parish at the

trial of a felony case. If a defendant is indigent and unable to pay for witnesses desired by him in addition to those summoned at the expense of the parish, art. 739 provides for a method by which he may apply to the court for the additional witnesses.

In the instant case, defendant called only one witness at trial. Dr. Hoffman could have been subpoenaed at the expense of the parish. Despite the fact that Dr. Hoffman's whereabouts was known to defendant at least two weeks prior to trial, no attempt was made to subpoena him.

In State v. Madison, 345 So. 2d 485 (La. 1977), we stated that when an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the state ought to supply the funds. There, however, we held that defendant did not make a sufficient showing of need to justify the procurement of an investigator. Similarly, in the instant case we find defendant made an insufficient showing that the dollar limitation placed on his defense and the lack of a private investigator prevented him from obtaining existing evidence crucial to his defense. The trial judge did not err in denying defendant's objection.

Assignment of Error No. 5 is without merit.

ASSIGNMENT OF ERROR NO. 13

Defendant contends the trial judge erred in charging the jury with the law of conspiracy, over defendant's objection, when defendant had not been charged with the crime of conspiracy.

La. R.S. 14:26 defines the offense of conspiracy as follows:

> Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.
>
> If the intended basic crime has been consummated, the conspirators may be tried for

> either the conspiracy or the completed offense, and a conviction for one shall not bar prosecution for the other.

A criminal conspiracy to commit any given offense is an inchoate crime, separate and distinct from the completed criminal conduct. However, when a defendant is on trial for the completed offense and the facts of the case establish the existence of a conspiracy, reference to the law of conspiracy may be relevant and permissible to allow the state to take advantage of the evidentiary rules found in La. R.S. 15:455, which provides:

> Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his codefendant. But to have this effect a prima facie case of conspiracy must have been established.

Therefore, if the state did in fact establish a prima facie case of conspiracy, the trial judge's charge to the jury as to the law of conspiracy was proper as the law applicable to the case. La. Code Crim. P. art. 802; State v. Matthews, 354 So. 2d 552 (La. 1978); State v. Sheppard, 350 So. 2d 615 (La. 1977); State v. Bennett, 341 So. 2d 847 (La. 1976); State v. Kaufman, 331 So. 2d 16 (La.), cert. denied, 429 U.S. 981 (1976); State v. Carter, 326 So. 2d 848 (La. 1975); State v. Brown, 326 So. 2d 839 (La. 1975), cert. denied, 429 U.S. 918 (1976).

The type of proof necessary to establish a conspiracy may be direct or circumstantial evidence. State v. Sheppard, supra; State v. Kaufman, supra. In State v. Carter, supra, we held that, when the only showing of conspiracy is that two people committed a crime, and there is no showing that defendant either committed or conspired to commit the criminal act, no prima facie case of conspiracy has been established. We further held that the fact, alone, that two or more have committed the crime charged is not sufficient to establish a prima facie case of conspiracy.

In the instant case, however, we find that there was a prima facie showing that two persons agreed or combined for the specific purpose of committing a crime. Two witnesses testified that defendant's car was in the vicinity of the crime just before its occurrence with two passengers sitting in it. One of those witnesses testified that a friend with her at the time identified one of the passengers as defendant. At the scene of the crime, police investigators found a butcher knife next to the body. They also found spots of blood of the same type as that of defendant. Several bottles of Chivas Regal scotch were missing, as were a metal strongbox and approximately $1,800.00. Ballistics tests performed on a bullet removed from the body of the victim indicated that it had been fired from a .38 caliber revolver. Two of defendant's roommates, Linda Pittman and Rod Reid, testified that defendant returned home several hours after the crime with their other roommate, Michael Glover. Defendant's hand was badly cut and he and Glover began packing their belongings. Pittman noticed an unusually large number of bills in Glover's wallet. At about 5:30 a.m., after consuming a bottle of Chivas Regal scotch they had brought in with them, defendant and Glover departed, telling Pittman and Reid that if anyone asked, they should say that defendant and Glover left two days before. After they left, Pittman and Reid noticed that a metal strongbox they had noticed during the packing was gone. The departure was about three and one-half hours after the crime. Furthermore, Pittman and Reid both testified defendant owned a knife like that found at the scene of the crime and Glover owned a .38 caliber revolver, the same type of gun as that used in the murder.

Since a prima facie case of conspiracy was established, the law of conspiracy was clearly applicable to the case. Accordingly, the trial judge did not err in charging the jury concerning the law of conspiracy.

Assignment of Error No. 13 is without merit.

ASSIGNMENT OF ERROR NO. 17

Defendant contends the trial judge erred in overruling his objection to the prosecutor's reference to hearsay testimony during closing argument. He argues the testimony was hearsay and, despite his failure to object when it was given, the prosecutor exceeded the scope of closing argument in referring to it.

During trial, the state called Debra Richard to testify concerning defendant's whereabouts immediately prior to the armed robbery-murder. She testified that she was an employee of the Red Lobster Inn, the scene of the crime and the former employer of defendant. On the night of the crime, she left work at about midnight and met several friends at a doughnut shop near the Inn. Sometime between 12:30 and 1:30 a.m., according to her testimony, a blue car known to her to be defendant's and occupied by two persons drove by in the direction of the Inn. She further testified that one of her friends, Donna Bonaventure, shouted "Hey, Colin." The person on the passenger side of the car stuck his arm out of the window and waved. Richard was unable to identify the persons in the car. During her testimony, defendant made no objection.

In his closing argument, the prosecutor stated: "The Bonaventure girl yelled, 'Hi, Colin' and somebody passing in the car that looked like his car, on the passenger's side, waved back and there was another occupant in the car. Conceivably she couldn't identify either one of them, she didn't see them, all she did was she heard Bonaventure say 'Hi, Colin' and looked up." At this point, defendant objected on the ground of hearsay. The trial judge overruled the objection.

An objection to the admissibility of testimony comes too late after the testimony has gone to the jury. State v. Richmond, 278 So. 2d 17 (La. 1973); State v. Foster, 164 La. 813, 114 So. 696 (1927).

La. Code Crim. P. art. 774 provides that the argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of

fact that the state or defendant may draw therefrom, and to the law applicable to the case. Hearsay evidence not objected to constitutes substantive evidence. State v. Allien, 366 So. 2d 1308 (La. 1978). Therefore, the state may refer in argument to hearsay evidence admitted without objection. See State v. Cason, 115 La. 897, 40 So. 303 (1906).

In the instant case, defendant did not object to the introduction of the hearsay statements when they were made. Thus, his hearsay objection during closing argument was untimely. Furthermore, because the statements constituted evidence, his objection that the prosecutor exceeded the scope of closing argument is without merit. The trial judge did not err in overruling the objection.

Assignment of Error No. 17 is without merit.

ASSIGNMENTS OF ERROR NOS. 19 AND 20

Defendant contends the trial judge erred in overruling his objections to the prosecutor's statements in closing argument that there was hostility between defendant and Fred Schmidt, the victim, and that Michael Glover had been driving defendant's automobile. He claims that these statements were not supported by the evidence and hence were not within the proper scope of closing argument.

In argument to the jury, the prosecutor thought it necessary to show a motive in order to connect defendant to the armed robbery-murder of Fred Schmidt. The prosecutor stated: "How do we connect this defendant and Mike Glover to this crime? Well, in several ways: (1) motive, there was hostility between this defendant and the victim in this case." Defendant objected, claiming there was no evidence in the record of hostility. The objection was overruled, and the prosecutor continued. He then stated: "We connect him [defendant] through and by his automobile, he was seen driving - - he was seen going that-a-way, driving in the passenger's side with Glover driving in his automobile by three people." Again defendant objected, claiming there was no evidence in the record to show that Glover was driving. This objection was also overruled.

Counsel are permitted in argument to make fair and reasonable conclusions from the facts introduced in evidence. La. Code Crim. P. art. 774; State v. de la Beckwith, 344 So. 2d 360 (La. 1977); State v. Lockett, 332 So. 2d 443 (La. 1976); State v. Weathers, 320 So. 2d 895 (La. 1975); State v. Smith, 257 La. 1109, 245 So. 2d 327 (1971). Further, counsel may properly comment on and summarize the evidence in arguing facts. State v. de la Beckwith, supra; State v. Luckett, 327 So. 2d 365 (La. 1975).

Brenda Rosenback testified that on the night of the murder, defendant and Fred Schmidt had had an argument. Furthermore, the manager's log kept by Fred Schmidt and introduced into evidence by the state stated: "Colin walked out, S.O.B." In view of this evidence, the prosecutor's statement that there was hostility between defendant and Fred Schmidt was not improper. It was a conclusion that the state could draw from the facts introduced in evidence.

Three persons testified that they had seen defendant's car in the vicinity of the Red Lobster Inn, the scene of the crime, just before the armed robbery-murder. Two of them further testified that two men were in the car. One testified that one of these men was defendant. Some time after the killing, defendant and Glover arrived at their apartment and packed to leave. They left together. The killing had been accomplished with a knife similar to that carried by defendant and a handgun of the same caliber as that of Glover. In view of this evidence, the prosecutor's statement that Glover was driving the car was not improper. It was a reasonable conclusion drawn from the facts in evidence.

In sum, the trial judge did not err in overruling defendant's objections to the prosecutor's statements in closing argument that there was hostility between defendant and Fred Schmidt and that Michael Glover had been driving defendant's automobile.

Assignments of Error Nos. 19 and 20 are without merit.

ASSIGNMENT OF ERROR NO. 26

Defendant contends the trial judge erred in denying his motion in arrest of judgment grounded on the claim that La. R.S. 14:30 and La. Code Crim. P. arts. 905-905.9 are unconstitutional on their face and as applied.

First, defendant argues the use of an aggravating circumstance as an element of the crime is unconstitutional because once the jury has determined guilt it has already determined the existence of an aggravating circumstance prior to the commencement of the sentencing hearing.[2]

This argument is without merit. Notwithstanding the verdict rendered in the guilt portion of the trial, to determine that the sentence of death be imposed the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists after a sentencing hearing. Defendant has the opportunity to introduce evidence, including that of mitigating circumstances, not introduced at trial. The jury is not bound to find the existence of an aggravating circumstance merely because it found defendant guilty of first degree murder.

La. Code Crim. P. art. 905.4(g) provides that one of the aggravating circumstances is that the "offense was committed in an especially heinous, atrocious or cruel manner." Defendant argues this provision is unconstitutionally vague and overbroad.

The argument is without merit. In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court answered a similar challenge to a Georgia provision authorizing imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture depravity of mind, or an aggravated battery to the victim" by stating: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way,

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2. At the time of the commission of the instant crime, conviction of first degree murder required proof of one of four of the aggravating circumstances listed in La. Code Crim. P. art. 905.4. State v. Payton, 361 So. 2d 866 (La. 1978). The aggravating circumstance charged and found in the guilt phase of the instant case was that defendant was engaged in the perpetration or attempted perpetration of armed robbery.

and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." We have previously construed art. 905.4(g) as incorporating some idea of torture or pitiless infliction of unnecessary pain on the victim. State v. Sonnier, 379 So. 2d 1336 (La. 1979) (on original hearing); State v. English, 367 So. 2d 815 (La. 1979). Accordingly, we hold here that the aggravating circumstance of art. 905.4(g) is not unconstitutionally vague and overbroad.

Defendant also argues that La. Code Crim. P. art. 905.8 accords too much discretion to the jury, resulting in arbitrary and capricious imposition of the death penalty. Article 905.8 provides:

> The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Defendant's claim is without merit. Although the trial judge must sentence the defendant in accordance with the recommendation of the jury, all discretion has not been placed with the jury. Adequate safeguards have been provided against the arbitrary imposition of the death penalty. The jury's recommendation must be based on a finding of at least one statutory aggravating circumstance and after considering any mitigating circumstances. Moreover, despite the jury's recommendation, the trial judge has the authority to grant a new trial and this court is required to review every sentence of death to determine if it is excessive.

Additionally, we note that our capital sentence law was modeled upon the Georgia statute upheld in Gregg, supra. That statute also bound the trial judge to sentence the defendant in accordance with the recommendation of the jury.

Finally, defendant argues the sentencing provisions are unconstitutional because they allow a defendant to be sentenced to death for the type of person he is rather than for the crime he committed. Specifically,

he points out that La. Code Crim. P. art. 905.2 provides that the "sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender."

This argument is without merit. Defendant cannot be sentenced to death without a finding of the existence of a statutory aggravating circumstance, no matter what type of person he is. Moreover, it has long been accepted in this country that sentencing should be done on an individual basis. Lockett v. Ohio, 438 U.S. 586 (1978). As the United States Supreme Court concluded in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> in capital cases the fundament respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

In sum, the trial judge did not err in denying defendant's motion in arrest of judgment.

Assignment of Error No. 26 is without merit.

ASSIGNMENT OF ERROR NO. 27

Defendant contends the trial judge erred in denying his motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for a new trial based on the same claims. He argues he was denied assistance of counsel because he was forced to make a choice between retaining counsel and taking the stand.

The record reveals that at the beginning of the sentencing hearing, before the jury was brought into the court, defendant moved the court to discharge Neal Wilkinson, his assistant counsel. Defendant indicated he desired to retain J. J. McKenzie as chief counsel. The court granted the motion but allowed Wilkinson to remain in the court to assist in any way he could. The jury was brought in and the prosecutor made his opening statement. Defendant then moved to discharge McKenzie. The court denied the motion and told defendant McKenzie would stay in court and advise him. Defendant then

asked the judge if he could take the stand. McKenzie told the judge he had advised defendant against taking the stand and requested to withdraw. The court denied counsel's request and stated defendant could take the stand. After a recess, defendant announced he agreed with counsel not to take the stand but would argue his case. In argument, defendant told the jury he wanted to be sentenced to death. McKenzie objected, defendant concluded, and McKenzie argued mitigating circumstances to the jury.

We do not agree that defendant was forced to make a choice between retaining counsel and taking the stand. While McKenzie initially presented defendant with a choice between testifying or continued representation, counsel was never allowed to withdraw and in fact continued his vigorous assertion of defendant's case by repeated objections to argument by the prosecution and by presenting additional argument on defendant's behalf. Defendant was aware of his right to take the stand. The opportunity both to take the stand and to have counsel remained open at all times. The trial judge appropriately resolved the conflict between defendant and his counsel while at the same time recognizing defendant's right to testify. Accordingly, the trial judge did not err in denying defendant's motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for a new trial based on the same claims.

Moreover, we note that, although defendant failed to take the stand, it appears clear from his closing argument that his sole motivation for taking the stand was to ask the jury to recommend the death sentence. This purpose having been fulfilled by his closing argument, it can hardly be argued defendant was deterred from testifying by the threat that counsel would no longer represent him.

Assignment of Error No. 27 is without merit.

SENTENCE REVIEW

Article 1, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La. Code Crim. P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La. Sup. Ct. R. 28, § 1, which provides:

> Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) Passion, prejudice or any other arbitrary factors

There is no evidence that defendant's sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. Moreover, we note both defendant and his victim are white.

(b) Statutory aggravating circumstances

The jury in its verdict found the following statutory aggravating circumstances:

> (a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbbery.
>
> (g) The offense was committed in an especially heinous, atrocious or cruel manner.

Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. In our view, the evidence amply supports the jury's finding that the defendant was engaged in the perpetration or attempted perpetration of armed robbery.

The jury also found that the offense was committed in an especially heinous, atrocious or cruel manner. We have previously construed this statutory aggravating circumstance as incorporating some idea of torture or pitiless infliction of unnecessary pain on the victim. State v. Sonnier, 379 So. 2d 1336 (La. 1979) (on original hearing); State v. English, 367 So. 2d 815 (La. 1979).

In the instant case, defendant and Glover had a gun, yet they chose first to stab Schmidt some thirty to thirty-five times in the back, neck, head, arms, and hands. One of these wounds was made in an attempt to stab through the victim's skull. As one of the police witnesses testified, the victim was "butchered." Accordingly, we find substantial evidence supporting the jury's finding that the murder was committed in an especially heinous, atrocious or cruel manner.

In sum, the evidence supports the jury's finding of two statutory aggravating circumstances.

(c) Proportionality to the penalty imposed in similar cases

Supreme Court Rule 28, § 4 provides that the district attorney shall file with this court a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. In the instant case, the list reveals that there have been twenty-eight first degree murder indictments filed in East Baton Rouge Parish. In addition, we know of two others. State v. Robert W. Williams, No. 65,563 (La., April 7, 1980); State v. Spooner, 368 So. 2d 1086 (La. 1979) (reversed and remanded for new trial). Fourteen of these indictments resulted in verdicts of guilty of first degree murder.[3] Of these fourteen, three defendants, including

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3. State v. Clark, No. 66,573 (instant case); State v. Robert W. Williams, No. 65,563 (La., April 7, 1980); State v. James C. Williams, No. 64,987 (La., March 3, 1980) (rehearing granted); State v. Glover, 380 So. 2d 626 (La. 1980); State v. Allen, 380 So. 2d 28 (La. 1980); State v. Foote, 379 So. 2d 1058 (La. 1980); State v. Collins, 378 So. 2d 928 (La. 1979); State v. Howard, 377 So. 2d 1226 (La. 1979); State v. Gertenschloger, 377 So. 2d 130 (La. 1979); State v. Edwards, 375 So. 2d 1365 (La. 1979) (remanded for further proceedings); State v. Spooner, 368 So. 2d 1086 (La. 1979) (reversed and remanded for new trial); State v. Holmes, No. 65,846 (La., filed Oct. 9, 1979); State v. Fitzpatrick, No. 66,770 (La., filed Feb. 6, 1980); State v. Gleim, No. 3-79-344 (La. 19th Jud. Dist. Ct., filed Jan. 31, 1980).

Colin Clark, received the death penalty.[4] In all of these cases, the defendants were the actual killers[5] and the killings occurred during armed robberies. Thus, in the cases most similar to defendant's, the same penalty was imposed.[6] A review of the other first degree murder convictions in East Baton Rouge Parish shows a dissimilarity between them and the instant case in that there were arguably no aggravating circumstances[7] or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.[8]

According to a presentence investigation report and the Uniform Capital Sentence Report, defendant is a twenty-six year old white male whose parents were divorced when he was eleven. His father was an alcoholic who beat him. Although of average intelligence, defendant quit school in the tenth grade. He admitted that he started taking drugs when he was fourteen. He is divorced and has no children. Defendant's record consists of juvenile arrests involving drugs and trespassing and criminal convictions for distribution of drugs, driving while intoxicated, obstructing an officer and driving

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4. The two other cases in which the death penalty was imposed are State v. Robert W. Williams, No. 65,563 (La., April 7, 1980), and State v. James C. Williams, No. 64,987 (La., March 3, 1980) (rehearing granted).

5. Although both Michael Glover, State v. Glover, 380 So. 2d 626 (La. 1980), and Ralph Holmes, Jr., State v. Holmes, No. 65,846 (La., filed Oct. 9, 1979), were parties to the same killings as were Colin Clark and Robert W. Williams and were convicted of first degree murder, neither was sentenced to death. However, neither was the actual killer in their respective crimes.

6. In State v. Edwards, 375 So. 2d 1365 (La. 1979) (remanded for further proceedings), defendant was the murderer and the killing occurred during an armed robbery. Defendant was sentenced to life imprisonment. There, however, defendant was seventeen years old; hence, it is possible the jury found sufficient mitigation to recommend life imprisonment rather than death.

7. State v. Allen, 380 So. 2d 28 (La. 1980); State v. Foote, 379 So. 2d 1058 (La. 1980); State v. Collins, 378 So. 2d 928 (La. 1979); State v. Gertenschloger, 377 So. 2d 130 (La. 1979); State v. Spooner, 368 So. 2d 1086 (La. 1979) (reversed and remanded for new trial); State v. Gleim, No. 3-79-344 (La. 19th Jud. Dist. Ct., filed Jan. 31, 1980).

8. State v. Glover, 380 So. 2d 626 (La. 1980); State v. Howard, 377 So. 2d 1226 (La. 1979); State v. Edwards, 375 So. 2d 1365 (La. 1979) (remanded for further proceedings); State v. Holmes, No. 65,846 (La., filed Oct. 9, 1979); State v. Fitzpatrick, No. 66,770 (La., filed Feb. 6, 1980).

violations. His arrest in California for a drug violation led to his return to Louisiana to stand trial on the instant charge.

After having considered the above factors, we are unable to conclude that the sentence imposed in the instant case is disproportionate to the penalty imposed in other cases, considering both the crime and the defendant.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed.

JUL 30 1980

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 66,573

COLIN CLARK

07C CALOGERO, Justice, dissenting

I respectfully dissent from the majority's affirmance of the conviction and sentence of this defendant because I do not believe the majority's treatment of the conspiracy issue is correct. Rather I believe defendant's assignment of error No. 13 has merit.

Initially, the state did not establish a prima facie case of conspiracy, a mandatory requirement prior to charging the jury on the law pertaining to conspiracy. In the evidence presented at trial there was no showing that Clark was engaged in a conspiracy to rob or to murder. There was evidence that Clark's vehicle was seen within one hour prior to the time the burglar alarm sounded, with two occupants. There was further evidence that Clark was seen three hours after the murder with Glover, that Clark and Glover were packing their things to leave town and that Glover had a large number of bills in his wallet. This evidence hardly constitutes a prima facie showing of conspiracy to rob or murder.

Criminal conspiracy is defined as "the agreement

or combination of two or more persons for the specific purpsoe of committing any crime. . . ." R.S. 14:26. This Court has held on numerous occasions that when the only indication of conspiracy is that two people committed a crime, and there is no showing that defendant either committed or conspired to commit the criminal act, no prima facie showing of conspiracy has been established. State v. Matthews, 354 So.2d 552 (La. 1978); State v. Sheppard, 350 So.2d 615 (La. 1977); State v. Bennett, 341 So.2d 847 (La. 1976); State v. Kaufman, 331 So.2d 16 (La. 1975) and State v. Carter, 326 So.2d 848 (La. 1975).

In the present case, there has been no showing that defendant conspired with anyone to commit any crime. Unlike the cases above, all of the evidence, other than the fact that two passengers were seen in defendant's car an hour before the crime, concerns the defendant's activities three hours after the crime. There is simply no showing that the defendant and/or any other person agreed or combined to commit this crime.

Without making a prima facie showing of conspiracy, the state can not take advantage of R.S. 15:455, which makes a defendant who is part of a conspiracy bound by the acts and declarations of a co-conspirator if they are done in furtherance of the conspiracy. Without the advantages of this provision, for a first degree murder conviction the state must prove, by independent evidence, that defendant both killed the victim with the specific intent to kill and did so in the course of an armed robbery. State v. Payton, 361 So.2d 866 (La. 1978). In the present case, the state did not make a prima facie showing of conspiracy and therefore, the charge on R.S. 15:455 should never have been given.

Since we can not now determine whether the jury, under R.S. 15:455, mistakenly attributed the acts of the other party

to this defendant or found independently that defendant had himself committed the requisite elements of the crime of first degree murder, I believe that defendant's conviction and sentence should be reversed and the case remanded for a new trial.

SUPREME COURT OF LOUISIANA NOV 4 1980

NO. 66,573

STATE OF LOUISIANA

VERSUS

COLIN CLARK

DENNIS, Justice, concurring in part and dissenting in part.

I concur in the judgment of the court in affirming defendant's conviction, but I respectfully dissent from the court's affirmance of the death penalty in this case.

I disagree with the majority's holding that the defendant's sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. See La. Sup. Ct. R. 28, § 1 a. The sentencing hearing prescribed following a verdict of guilty in a capital case is concerned with the circumstances of the offense and the character and propensities of the defendant. The defendant's wishes with respect to his life are neither aggravating nor mitigating evidence, and therefore defendant's plea to the jury, requesting the death sentence, should not have been allowed. See La. C.Cr.P. art. 905.2.

In State v. English, 367 So.2d 815 (La. 1979), we recognized that Code of Criminal Procedure article 905.2's requirement that the sentencing hearing be conducted in accordance with the rules of evidence mandates a reversal where an erroneous ruling by the trial judge was prejudicial to the defendant. Allowing the defendant to make his plea for the death penalty in this case introduced an arbitrary

factor into the sentencing hearing which may have tended to inflame the passions of the jury. See La. Sup. Ct. R. 28, § 1 a. Such a request clearly is not probative of any fact relevant in the sentencing hearing, and its potential prejudice requires at the least a correcting instruction. La. C.Cr.P. art. 771.

Moreover, Article 557 of the Code of Criminal Procedure forbids a court to accept a guilty plea in a capital case. Such a prohibition is a reflection of a legislative policy against a person bringing about his own death. That policy is an additional reason why the sentence in this case should be reversed.

In addition to the defendant's plea that the jury take his life, another impermissible, arbitrary factor was introduced into the sentencing process. The prosecutor in rebuttal to the defense attorney's closing argument stated:

> "Since the law mandates that a sentence of death shall not be imposed unless the jury finds at least one . . . aggravating circumstance . . . one must conclude that the converse or the reverse is that the death penalty would be mandated if aggravating circumstances were presented and if the mitigating circumstances were of an execrable [sic] nature . . . . " [emphasis added]

The prosecutor's statement to the jury incorrectly represented the law to the jury. The law does not direct the jury to put the defendant to death in any particular case. The law simply requires the jury to find an aggravating circumstance beyond a reasonable doubt and weigh it against any mitigating evidence. If the jury finds the death penalty "inappropriate," it is not required to impose capital punishment regardless of the nature or existence of any mitigating circumstances. See La. C.Cr.P. arts. 905.3 and 905.6. Thus, the prosecutor's statement, which the judge did not tell the jury to disregard, introduced an arbitrary and erroneous factor into the sentencing process which may have improperly prejudiced the jury.

For the above assigned reasons, I therefore respectfully dissent.

APPENDIX B

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

NEW ORLEANS, 70112

New Orleans, September 12, 1980

Court was duly opened pursuant to adjournment. Present Their Honors: Chief Justice John A. Dixon, Jr., Pascal F. Calogero, Jr., Walter F. Marcus, James L. Dennis, Fred A. Blanche, Jack Crozier Watson, Harry T. Lemmon, Associate Justices.

REHEARING DENIED:

* *

66,573 State of Louisiana vs. Colin Clark
CALOGERO & DENNIS, J.J., would grant a rehearing.

* *

I, Frans J.Labranche, Jr., Clerk of Court, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this 10th day of November, 1980.

Clerk of Court

APPENDIX C

STATE OF LOUISIANA	:	DOCKET NO. 8-78-742 SEC. V
	:	19TH JUDICIAL DISTRICT COURT
VS.	:	EAST BATON ROUGE PARISH
COLIN CLARK	:	STATE OF LOUISIANA

WARRANT FOR EXECUTION OF PERSON CONDEMMED

TO: Hon. C. Paul Phelps,
Secretary of the Department of Corrections
State of Louisiana
Department of Corrections
Baton Rouge, Louisiana

WHEREAS, it appears from the annexed duly certified copy of the indictment, verdict, including the finding of guilt, jury recommendation, sentence and the judgment of the Supreme Court of Louisiana affirming the sentence of death, and denial of a rehearing by the Supreme Court of Louisiana, that at a session of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, Colin Clark was convicted on the 9th day of August, 1979, of the crime of First Degree Murder of Fred Schmidt, in violation of La. R. S. 14:30, and that on the 9th day of August, 1979, the jury unanimously recommended that said defendant be sentenced to death; and that in accordance with the said recommendation of the jury, the undersigned Judge of the said Court, sentenced the said Colin Clark to death on October 31, 1979; and that the said conviction and said sentence of death has been finally affirmed by the Supreme Court of Louisiana and a rehearing has been denied:

Now therefore, in accordance with the provisions of R. S. 15:567, I, Carl A. Guidry, Judge of the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana,do hereby command you as Secretary of the Department of Corrections to cause the execution of Colin Clark, the condemned in this case, in the manner provided by law. You shall cause the condemned, Colin Clark, to be put to death on Friday, January 23, 1981, between the hours of 12:00 o'clock, midnight and 3:00 o'clock A.M., and you shall follow all of the requirements and requisites of the law in carrying out this execution.

A certified copy of this Death Warrant shall be mailed by the Clerk of Court of the Parish of East Baton Rouge to the Governor of the State of Louisiana, return receipt requested, and the return receipt shall be filed in the record of these

proceedings upon its return to the said Clerk of Court.

THUS DONE, RENDERED, READ AND SIGNED in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana, on this 24th day of October, 1980.

Carl A. Guidry

CARL A. GUIDRY, JUDGE
19th Judicial District Court
Parish of East Baton Rouge, Div. "K"
State of Louisiana

C E R T I F I C A T E

The foregoing death warrant was received by the Secretary of Corrections on this _____ day of _____, 1980.

_____
Secretary of Corrections
State of Louisiana

APPENDIX D

Article 905: Capital Cases; Sentencing Hearing Required.

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Article 905.1: Sentencing Hearing Jury; Commencement.

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of the Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Article 905.2: Sentencing Hearing; Procedure And Evidence.

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Article 905.3: Sentence Of Death; Jury Findings.

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating curcumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Article 905.4: Aggravating Circumstances.

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Article 905.5: Mitigating Circumstances.

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Article 905.6: Jury; Unanimous Recommendation.

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.7: Form Of Recommendations.

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
FOREMAN"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
FOREMAN"

Article 905.8: Imposition Of Sentence.

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.9: Review On Appeal.

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

RULE XXVIII. CAPITAL SENTENCE REVIEW

RULE 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5715

ORIGINAL COPY

COLIN CLARK
PETITIONER

VERSUS

STATE OF LOUISIANA
RESPONDENT

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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STATE OF LOUISIANA

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NINETEENTH JUDICIAL DISTRICT
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COLIN CLARK NO. 80-5715

VERSUS

STATE OF LOUISIANA

APPEARANCE OF COUNSEL

To the Clerk of the United States Supreme Court:

Please enter my appearance as attorney for the State of Louisiana, Respondent, in the above entitled matter.

Respectfully submitted,

BY: Ralph L. Roy

RALPH L. ROY
ASSISTANT DISTRICT ATTORNEY

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980
NO. 80-5715

COLIN CLARK — PETITIONER

VERSUS

STATE OF LOUISIANA — RESPONDENT

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The petitioner, Colin Clark, is requesting that this Honorable Court grant Writs of Certiorari to review the judgment of the Louisiana State Supreme Court affirming his conviction and death sentence on June 23, 1980 (rehearing was denied on September 2, 1980).

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 387 So.2d 1124 (La. 1980). A copy of that opinion is attached hereto and made apart hereof.

STATEMENT OF THE CASE

On Saturday, July 15, 1978, Fred Schmidt, the manager of the Red Lobster Restaurant in Baton Rouge, Louisiana, was brutally stabbed and shot to death. Evidence introduced at trial indicated that he had been stabbed between thirty and thirty-five times and then shot after the stabbing was finished. The restaurant was robbed of cash and other articles and the assailant or assailants escaped.

Further evidence indicated that Colin Clark, the defendant herein, was employed at the Red Lobster Restaurant prior to the time of this brutal murder, had an argument with the manager the same night as the murder and then quit. Fred Schmidt's log read "Colin walked out, SOB". Three persons testified that they saw the defendant's car within three blocks of the restaurant immediately prior to the crime, and two of the witnesses said they saw two persons in the car. One witness

on the stand testified that a friend had yelled "Hey, Colin" whereupon one of the passengers in the car stuck out his hand and waived.

Further testimony at the trial showed that the defendant and a friend Michael Glover, came back to apartment shortly after the time of this brutal murder and robbery, bandaged his hand which was bleeding badly, packed his clothes and left town. The defendant's friend, Michael Glover, had an unusually large number of bills with him and the two men were drinking Chevas Regal scotch (two bottles of Chevas Regal were taken from the Red Lobster Restaurant along with a strong box containing eighteen hundred dollars ($1,800.00) in cash).

The defendant was arrested in San Diego, California later, and Michael Glover, his friend, was arrested in New York City. Both were tried in East Baton Rouge Parish and Michael Glover was given life imprisonment, while Colin Clark was sentenced to death.

REASONS FOR GRANTING THE WRIT

In his reasons for granting the writ, the defendant complains that there was never a finding of specific intent on his part as far as this murder was concerned because a part of the jury instructions included a recitation of the Louisana law on conspiracy.

As interpreted by the Louisiana State Supreme Court in State v. McAllister, 366 So.2d 1340 (La. 1978), the Louisiana law on conspiracy is to be instructed by the courts in such a way that the mental element of each conspirator must be proved at trial and the conviction and sentence accorded to each conspirator must be commiserate with the mental intent proved. In his charge to the jury, the trial judge said "thus, in order to convict this defendant of first degree murder you must find that the defendant killed or was a principle in the killing of Fred Schmidt. And that the defendant had specific intent to kill or inflict great bodily harm . . . ."

As interpreted by the Louisiana State Supreme Court, and as charged to the trial jury in this case, the Louisiana law on conspiracy requires that the mental element of specific intent be proved beyond

a reasonable doubt before a jury can convict a person of first degree murder.

In his brief, the defendant asserts that, without eye witnesses, it was difficult to prove in this matter who had killed Fred Schmidt and whether or not that killing had been intentional or deliberate. The State would submit that the facts of this gruesome murder would establish the latter contention beyond a reasonable doubt. The facts of Fred Schmidt's death showed clearly that this was not a murder committed accidentally while someone was cleaning his gun, or that the gun accidentally went off during a scuffel. Fred Schmidt was repeatedly stabbed all over the upper part of his body. After the stabbing, Schmidt was shot with a pistol. This was no accidental killing.

The fact that no eye witnesses existed to this murder, other than the perpetrators, certainly made proof somewhat more difficult for the prosecution. However, circumstantial evidence is a just and valid and constitutional method of proving crimes. The circumstantial evidence of Colin Clark murdered Fred Schmidt was very strong: There was hostility between Clark and Schmidt; Clark had quit earlier that evening; Clark's car was seen in the vicinity of the Red Lobster at about the time of the murder-robbery; someone in that car responded to the name of "Colin" when yelled by a witness; Clark was seen by roommates shortly after the murder-robbery with a bad cut on his hand; his roommate had an unusual amount of money with him; they were drinking Chevas Regal scotch; and they packed their clothes and hurriedly fled the Baton Rouge area. Colin Clark had a reason for committing the crime, he had an opportunity in that he was in the near vicinity when the crime was committed, and he fled to California within several hours after the commission of the crime. Furthermore, the fact that his hand was badly cut was some evidence that he could have been involved in the brutal knifing of Fred Schmidt. All of these things together, though circumstantial, prove beyond a reasonable doubt that Colin Clark committed a deliberate and gruesome crime.

CONCLUSION

The State submits that the jury in this matter, though instructed in (among a number of other things) the Louisiana law on conspiracy, was carefully instructed as to the requirement of specific intent for the crime of first degree murder. These jury instructions followed the requirements of the Louisiana State Supreme Court in instructing the law on conspiracy. Furthermore, the State submits that ample evidence existed to show that Colin Clark brutally murdered Fred Schmidt at the Red Lobster Restaurant and that the trial jury was presented with more than sufficient evidence to convict this defendant and sentence him to death.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

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NINETEENTH JUDICIAL DISTRICT
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RALPH L. ROY
ASSISTANT DISTRICT ATTORNEY
NINETEENTH JUDICIAL DISTRICT
BATON ROUGE, LOUISIANA

BY: Ralph L. Roy
RALPH L. ROY
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I, Ralph L. Roy, a member of the Bar of the United States Supreme Court, Assistant District Attorney for the Parish of East Baton Rouge, represent the State of Louisiana, respondent herein. I hereby certify that I have served a copy of the foregoing Opposition to Application for Writ of Certiorari to the Supreme Court of Louisiana

by depositing same in the United States Mail, first class postage prepaid, addressed to Mr. Richard E. Shapiro, Attorney for Defendant, 344 Camp Street, Suite 708, New Orleans, Louisiana 70130, in accordance with Rull 33, Paragraph 1 of the Rules of the United States Supreme Court.

This 10th day of December, 1980.

RALPH L. ROY
ASSISTANT DISTRICT ATTORNEY

Beary v. United States, 590 F.2d 544 (4th Cir. 1978), involved admissibility of inculpatory remarks made by a prisoner to a paid informer. Citing the dissent in *Miller v. California*, *Henry*, supra, held that an accused's right to counsel was violated by the placing of a paid informer in the accused's cell. In holding the accused's statements inadmissible under the circumstances the court in *Henry*, supra, noted:

"An undisclosed government agent may effectively 'interrogate' a defendant by simply engaging the defendant in a general conversation and if the response is a confession of guilt, the agent need not make any further more pointed inquiries. *Miller v. California*, 392 U.S. 616, 88 S.Ct. 2258, 20 L.Ed.2d 1332 (1968) (dissent from dismissal of certiorari).

In the instant case, even if we assume that Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did testify that he engaged in conversation with his cellmate Henry. If, by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer*. We hold therefore that Henry's right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel."

Admittedly, *Henry*, supra, differs from the case at bar in that in *Henry*, the accused, was under indictment. Here, it is significant, in my opinion, that the defendant had been expressly informed by the police that he was regarded as a perpetrator of the homicide.

In my judgment it is a violation of an accused's *Miranda* rights for the police to accomplish by subterfuge and trickery, in the form of a planted paid informer, that which the police cannot do under color of law. In this instance, the informer was not compensated in material form, but in the form of a promise of leniency and the dismissal of criminal charges pending against him. He was acting with the consent of, pursuant to the authority of, and subject to the direction and supervision of the police. He was in law and in fact an agent of the police.

In my judgment the statements made to the informer were tainted and should not be admissible in evidence against him.

I respectfully dissent.

KEY NUMBER SYSTEM

STATE of Louisiana

v.

Colin CLARK.

No. 66573.

Supreme Court of Louisiana.

June 23, 1980.

Dissenting Opinion July 30, 1980.

Rehearing Denied Sept. 12, 1980.

Defendant was convicted on a jury verdict before the 19th Judicial District Court, Parish of East Baton Rouge, Carl A. Guidry, J., of first-degree murder, and was sentenced to death, and he appealed for a reversal of his conviction and sentence. The Supreme Court, Marcus, J., held that: (1) defendant made insufficient showing that dollar limitation placed on his defense and lack of private investigator prevented him from obtaining existing evidence crucial to his defense; (2) trial judge did not err in charging jury with law of conspiracy; (3) prosecutor did not exceed the scope of closing argument; (4) statements made in closing argument were supported by the evidence; (5) statute providing for aggravating circumstance that the offense be committed in especially heinous, atrocious, or cruel manner was not constitutionally vague and overbroad; (6) death penalty statute did not present too much discretion to the jury; (7) sentencing provisions did not unconstitutionally permit defendant to be sentenced to death for type of person he was rather than for crime he committed; (8) trial court did not err in denying motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for a new trial based on the same claims; (9) evidence supported jury's finding of two statutory aggravating circumstances; and (10) sentence imposed was not disappropriate to the penalty imposed in other cases, considering both crime and defendant.

Conviction and sentence affirmed.

Dixon, C. J., concurred, not agreeing that the conspiracy charge was proper but believing it was not prejudicial.

Dennis, J., concurred in part and dissented in part with reasons and would grant a rehearing.

Calogero, J., dissented and assigned reasons and would grant a rehearing.

1. Costs ⇐302.3

Defendant who called only one witness at trial and whose counsel admitted that he had not contacted allegedly necessary psychiatric witness about his possible testimony made insufficient showing that dollar limitation placed on his defense and lack of a private investigator prevented him from obtaining existing evidence crucial to his defense.

2. Conspiracy ⇐28(1)

Criminal conspiracy to commit any given offense is an inchoate crime, separate and distinct from completed criminal conduct.

3. Criminal Law ⇐791

When defendant is on trial for completed offense and facts of the case establish existence of a conspiracy, reference to law of conspiracy may be relevant and permissible to allow state to take advantage of evidentiary rules which provide that each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise. LSA-

4. Conspiracy ⇐47(2)

Type of proof necessary to establish conspiracy may be direct or circumstantial evidence. LSA-R.S. 14:26.

5. Criminal Law ⇐791

In prosecution for first-degree murder, evidence, including testimony of witnesses that defendant's car was in the vicinity of the crime just before its occurrence with two passengers sitting in it, one of whom was identified as defendant, testimony of two of defendant's roommates that defendant and their other roommate returned home several hours after the crime, packed their belongings, and departed, telling witnesses that they should say that defendant and roommate left two days before, and testimony that defendant owned knife like that found at crime scene and that roommate owned same type of gun as that used in the murder, established prima facie case of conspiracy; therefore, trial judge did not err in charging jury concerning law of conspiracy. LSA-R.S. 14:26, 14:30, 15:455; LSA-C.Cr.P. art. 802.

6. Criminal Law ⇐693

Objection to admissibility of testimony comes too late after testimony has gone to the jury.

7. Criminal Law ⇐698(1), 720(3)

Hearsay evidence not objected to constitutes substantive evidence; therefore, state may refer in argument to hearsay evidence admitted without objection. LSA-C.Cr.P. art. 774.

8. Criminal Law ⇐693

Where defendant did not object to the introduction of hearsay statements when they were made, his hearsay objection during closing argument was untimely. LSA-C.Cr.P. art. 774.

9. Criminal Law ⇐720(3)

Unobjected to hearsay statements constituted evidence; therefore, prosecutor did not exceed scope of closing argument in referring to such statements. LSA-C.Cr.P.

10. Criminal Law ⇐720(6)

Counsel are permitted in argument to make fair and reasonable conclusions from facts introduced in evidence. LSA–C.Cr.P. art. 774.

11. Criminal Law ⇐720(1)

Counsel may properly comment on and summarize evidence in arguing facts.

12. Criminal Law ⇐720(9)

In view of testimony that on the night of the murder defendant and victim had had an argument and evidence that manager's log kept by victim stated that defendant "walked out, S.O.B.," prosecutor's statement in closing argument that there was hostility between defendant and victim was not improper. LSA–C.Cr.P. art. 774.

13. Criminal Law ⇐720(9)

In view of testimony by three persons that they had seen defendant's car in the vicinity of the crime scene just before armed robbery–murder, testimony that two men were in the car and that one of these men was defendant, evidence that sometime after the killing defendant and his roommate arrived at their apartment, packed, and left together, and evidence that killing had been accomplished with knife similar to that carried by defendant and handgun of same caliber as that of roommate, prosecutor's statement in closing argument that roommate had been driving the car in which defendant was riding was not improper.

14. Homicide ⇐354

Notwithstanding verdict rendered in guilt portion of trial for first–degree murder, to determine that sentence of death be imposed jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists after a sentencing hearing, during which defendant has opportunity to introduce evidence, including that of mitigating circumstances, not introduced at trial.

15. Homicide ⇐354

Jury is not bound to find existence of an aggravating circumstance so as to justify imposition of death penalty merely because jury found defendant guilty of first–degree murder; therefore, use of aggravating circumstance as element of the crime is not unconstitutional on ground that jury which has determined guilt has already determined existence of an aggravating circumstance prior to commencement of the sentencing hearing. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905–905.9.

16. Criminal Law ⇐1206(1)

Statute which provides that one of the aggravating circumstances which may be used to justify imposition of the death penalty is that the offense be committed in an especially heinous, atrocious, or cruel manner is not unconstitutionally vague and overbroad. LSA–C.Cr.P. art. 905.4(g).

17. Criminal Law ⇐1206(1)

Although trial judge must sentence defendant in accordance with the recommendation of the jury, all discretion has not been placed with the jury, whose recommendation must be based on a finding of at least one statutory aggravating circumstance and after considering any mitigating circumstances; therefore, statute providing for death penalty did not result in its arbitrary and capricious imposition. LSA–C.Cr.P. art. 905.8.

18. Criminal Law ⇐1208(1)

Statute providing that the sentencing hearing focus on circumstances of the offense and character and propensities of the offender did not unconstitutionally permit defendant, who could not be sentenced to death without finding of existence of a statutory aggravated circumstance, to be sentenced to death for type of person he was rather than for crime he committed. LSA–C.Cr.P. art. 905.2.

19. Criminal Law ⇐641.10(2), 918(1)

Where, although counsel initially presented defendant with choice between testifying or continued representation, counsel was never allowed to withdraw and in fact continued vigorous assertion of defendant's case by repeated objections to argument by prosecution and by presenting additional argument on defendant's behalf, defendant was not forced to make choice between retaining counsel and taking the stand and therefore trial court did not err in denying defendant's motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for new trial based on the same claims.

20. Homicide ⇐354

Death sentence imposed upon defendant after his conviction for first–degree murder was not imposed under influence of passion, prejudice, or any other arbitrary factors. LSA–C.Cr.P. art. 905.9; Supreme Court Rules, Rule 28, § 1, 8 LSA–R.S.

21. Robbery ⇐1

"Armed robbery" is theft of anything of value from person of another or which is in immediate control of another by use of force or intimidation while armed with a dangerous weapon.

See publication Words and Phrases for other judicial constructions and definitions.

22. Homicide ⇐354

In prosecution for first–degree murder wherein jury recommended sentence of death, evidence amply supported jury's finding as a statutory aggravated circumstance that defendant was engaged in the perpetration or attempted perpetration of armed robbery. Supreme Court Rules, Rule 28, § 1, 8 LSA–R.S.

23. Homicide ⇐354

In prosecution for first–degree murder, substantial evidence, including fact that although defendant and his roommate had a gun they chose first to stab victim some 30 to 35 times in the back, neck, head, arms, and hands, supported jury's finding, as statutory aggravated circumstance warranting imposition of the death penalty, that the murder was committed in an especially heinous, atrocious, or cruel manner. Supreme Court Rules, Rule 28, § 1, 8 LSA–R.S.; LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.4(g).

24. Criminal Law ⇐1208(1)

Death sentence imposed after defendant's conviction for first–degree murder was not disproportionate to the penalty imposed in other cases, considering both the crime and defendant, whose record consisted of juvenile arrests involving drugs and trespassing and criminal convictions for distribution of drugs, driving while intoxicated, obstructing an officer, and driving violations. Supreme Court Rules, Rule 28, § 4, 8 LSA–R.S.; LSA–R.S. 14:30.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Ossie Brown, Dist. Atty., Kay Kirkpatrick, Asst. Dist. Atty., for plaintiff–appellee.

M. Michelle Fournet, Asst. Public Defender, J. J. McKenzie, Baton Rouge, for defendant–appellant.

MARCUS, Justice.

Colin Clark was indicted by the grand jury for the first degree murder of Fred Schmidt on July 15, 1978, in violation of La.R.S. 14:30. After trial by jury, defendant was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The matter was submitted on the evidence of the trial on the issue of guilt without introduction of other evidence. The jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced defendant to death in accordance with the recommendation of the jury. On appeal, defendant relies on twenty–seven assignments of error for reversal of his conviction and sentence.[1]

FACTS

On Saturday, July 15, 1978, at 1:50 a. m., a burglar alarm was set off at the Red Lobster Inn in Baton Rouge, Louisiana. Police arrived at the Inn at 2:05 a. m. and upon entering found the body of Fred

1. Defendant has expressly abandoned Assignments of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 16, 18, 21, 22, 23, 24 and 25. Additionally, defendant has neither briefed nor argued Assignment of Error No. 15. Hence, we consider it to be abandoned. *State v. Blanton*, 325 So.2d 586 (La.1976); *State v. Carlisle*, 315 So.2d 675 (La.1975)

Schmidt, the assistant manager of the restaurant. Schmidt had been stabbed approximately thirty to thirty-five times and had been shot once. A pathologist testified that the knife wounds were delivered before the shooting, which produced instant death. Two of the knife wounds would otherwise have been fatal. Found next to the body was a butcher knife that according to the pathologist could have been the knife used. A ballistics expert testified that the bullet found was fired from a .38 caliber revolver. Also found at the scene were spots of blood of the same type as that of defendant, two band-aid wrappers and an entry in the manager's log reading "Colin walked out, S.O.B." A metal strongbox, approximately $1,800.00 and two bottles of Chivas Regal scotch were missing.

Defendant had been employed as a waiter at the Red Lobster and had quit earlier that evening. A waitress at the restaurant testified that defendant and the victim had an argument that evening. Three witnesses testified they saw defendant's car at the restaurant or several blocks away driving toward the restaurant immediately prior to the crime. Two of these witnesses also testified they saw two persons in the car. One witness testified a friend with her shouted, "Hey, Colin," when the car passed and the passenger in the car stuck his arm out of the window and waved.

Two of defendant's roommates, Linda Pittman and Rod Reid, testified they were in bed in their room at 4:00 or 4:30 a. m. when defendant and their other roommate, Michael Glover, returned home. Defendant shut the door to Pittman and Reid's room, telling them he had a couple of lady friends with him. When they heard unusual shuffling noises, Pittman and Reid left their room to investigate. Defendant and Glover were packing their belongings. Defendant's hand was badly cut and, according to Pittman, had band-aids on it. Pittman noticed an unusually large number of bills in Glover's wallet. At about 5:30 a. m., after consuming a bottle of Chivas Regal scotch they had brought in with them, defendant and Glover departed, telling Pittman and that defendant and Glover left for San Francisco, California, two days before. After they left, Pittman and Reid noticed that a metal strongbox they had seen during the packing was gone. Furthermore, Pittman and Reid both testified defendant owned a knife like that found at the scene of the crime and Glover owned a .38 caliber revolver, the same type of gun as that used in the murder. Glover was arrested in New York City; defendant was arrested in San Diego, California; his car was found in Tallahassee, Florida.

ASSIGNMENT OF ERROR NO. 5

Defendant contends the trial judge erred in denying his objection to the one thousand dollar limitation placed on the amount he was allowed to expend in his defense. He argues that, due to this limitation, he was unable to hire an investigator and to locate and procure for trial a certain material witness.

On August 3, 1979 (Friday), defendant filed a motion for a continuance due to the "unavailability of necessary out-of-state witnesses." Trial was set for Monday, August 6, 1979. Defendant had been arraigned and counsel appointed some six months earlier. Attached to the motion was an affidavit of counsel which stated that, despite due diligence and effort of counsel, it had only recently come to his attention that the testimony of Dr. Francis H. Hoffman of Mobile, Alabama, was required. The affidavit continued by stating that Dr. Hoffman, a psychiatrist, "would possibly be a necessary defense witness" and that it was "believed by the defense" that he would testify that the crime charged was outside of the personality and psychological makeup of defendant. Counsel further stated that he learned of Dr. Hoffman approximately two weeks before trial.

Immediately prior to the commencement of trial, defense counsel admitted that he had not contacted Dr. Hoffman about his possible testimony. The testimony of an-

ed as a basis for the continuance, was stipulated by agreement of counsel. The trial judge denied the motion for a continuance. Prior to the calling of the first witness, defendant lodged an objection to the dollar limitation placed on the amount he was allowed to expend in his defense. The trial judge noted his objection.

La. Code Crim.P. art. 738 provides that each defendant shall be allowed to summon twelve witnesses at the expense of the parish at the trial of a felony case. If a defendant is indigent and unable to pay for witnesses desired by him in addition to those summoned at the expense of the parish, art. 739 provides for a method by which he may apply to the court for the additional witnesses.

In the instant case, defendant called only one witness at trial. Dr. Hoffman could have been subpoenaed at the expense of the parish. Despite the fact that Dr. Hoffman's whereabouts was known to defendant at least two weeks prior to trial, no attempt was made to subpoena him.

[1] In *State v. Madison*, 345 So.2d 485 (La.1977), we stated that when an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the state ought to supply the funds. There, however, we held that defendant did not make a sufficient showing of need to justify the procurement of an investigator. Similarly, in the instant case we find defendant made an insufficient showing that the dollar limitation placed on his defense and the lack of a private investigator prevented him from obtaining existing evidence crucial to his defense. The trial judge did not err in denying defendant's objection.

Assignment of Error No. 5 is without merit.

ASSIGNMENT OF ERROR NO. 13

Defendant contends the trial judge erred in charging the jury with the law of con- [illegible] when defendant had not been charged with the crime of conspiracy.

[2, 3] La.R.S. 14:26 defines the offenses of conspiracy as follows:

> Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.
>
> If the intended basic crime has been consummated, the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar prosecution for the other.

A criminal conspiracy to commit any given offense is an inchoate crime, separate and distinct from the completed criminal conduct. However, when a defendant is on trial for the completed offense and the facts of the case establish the existence of a conspiracy, reference to the law of conspiracy may be relevant and permissible to allow the state to take advantage of the evidentiary rules found in La.R.S. 15:455, which provides:

> Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his codefendant. But to have this effect a prima facie case of conspiracy must have been established.

Therefore, if the state did in fact establish a prima facie case of conspiracy, the trial judge's charge to the jury as to the law of conspiracy was proper as the law applicable to the case. La. Code Crim.P. art. 802; *State v. Matthews*, 354 So.2d 552 (La.1978); *State v. Sheppard*, 350 So.2d 615 (La.1977); *State v. Bennett*, 341 So.2d 847 (La.1976); *State v. Kaufman*, 331 So.2d 16 (La.), cert.

denied, 429 U.S. 981, 97 S.Ct. 495, 50 L.Ed.2d 591 (1976); *State v. Carter*, 326 So.2d 848 (La.1975); *State v. Brown*, 326 So.2d 839 (La.1975), *cert. denied*, 429 U.S. 918, 97 S.Ct. 310, 50 L.Ed.2d 284 (1976).

[4] The type of proof necessary to establish a conspiracy may be direct or circumstantial evidence. *State v. Sheppard, supra; State v. Kaufman, supra.* In *State v. Carter, supra*, we held that, when the *only* showing of conspiracy is that two people committed a crime, and there is *no showing* that defendant either committed or conspired to commit the criminal act, no prima facie case of conspiracy has been established. We further held that the fact, *alone*, that two or more have committed the crime charged is not sufficient to establish a prima facie case of conspiracy.

[5] In the instant case, however, we find that there was a prima facie showing that two persons agreed or combined for the specific purpose of committing a crime. Two witnesses testified that defendant's car was in the vicinity of the crime just before its occurrence with two passengers sitting in it. One of those witnesses testified that a friend with her at the time identified one of the passengers as defendant. At the scene of the crime, police investigators found a butcher knife next to the body. They also found spots of blood of the same type as that of defendant. Several bottles of Chivas Regal scotch were missing, as were a metal strongbox and approximately $1,800.00. Ballistics tests performed on a bullet removed from the body of the victim indicated that it had been fired from a .38 caliber revolver. Two of defendant's roommates, Linda Pittman and Rod Reid, testified that defendant returned home several hours after the crime with their other roommate, Michael Glover. Defendant's hand was badly cut and he and Glover began packing their belongings. Pittman noticed an unusually large number of bills in Glover's wallet. At about 5:30 a. m., after consuming a bottle of Chivas Regal scotch they had brought in with them, defendant and Glover departed, telling Pittman and Reid that if anyone asked, they should say that defendant and Glover left two days before. After they left, Pittman and Reid noticed that a metal strongbox they had noticed during the packing was gone. The departure was about three and one-half hours after the crime. Furthermore, Pittman and Reid both testified defendant owned a knife like that found at the scene of the crime and Glover owned a .38 caliber revolver, the same type of gun as that used in the murder.

Since a prima facie case of conspiracy was established, the law of conspiracy was clearly applicable to the case. Accordingly, the trial judge did not err in charging the jury concerning the law of conspiracy.

Assignment of Error No. 13 is without merit.

ASSIGNMENT OF ERROR NO. 17

Defendant contends the trial judge erred in overruling his objection to the prosecutor's reference to hearsay testimony during closing argument. He argues the testimony was hearsay and, despite his failure to object when it was given, the prosecutor exceeded the scope of closing argument in referring to it.

During trial, the state called Debra Richard to testify concerning defendant's whereabouts immediately prior to the armed robbery-murder. She testified that she was an employee of the Red Lobster Inn, the scene of the crime and the former employer of defendant. On the night of the crime, she left work at about midnight and met several friends at a doughnut shop near the Inn. Sometime between 12:30 and 1:30 a. m., according to her testimony, a blue car known to her to be defendant's and occupied by two persons drove by in the direction of the Inn. She further testified that one of her friends, Donna Bonaventure, shouted "Hey, Colin." The person on the passenger side of the car stuck his arm out of the window and waved. Richard was unable to identify the persons in the car. During her testimony, defendant made no objection.

In his closing argument, the prosecutor stated: "The Bonaventure girl yelled, 'Hi, Colin' and somebody passing in the car that looked like his car, on the passenger's side, waved back and there was another occupant in the car. Conceivably she couldn't identify either one of them, she didn't see them, all she did was she heard Bonaventure say 'Hi, Colin' and looked up." At this point, defendant objected on the ground of hearsay. The trial judge overruled the objection.

[6] An objection to the admissibility of testimony comes too late after the testimony has gone to the jury. *State v. Richmond*, 278 So.2d 17 (La.1973); *State v. Foster*, 164 La. 813, 114 So. 696 (1927).

[7] La.Code Crim.P. art. 774 provides that the argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. Hearsay evidence not objected to constitutes substantive evidence. *State v. Allien*, 366 So.2d 1308 (La. 1978). Therefore, the state may refer in argument to hearsay evidence admitted without objection. *See State v. Cason*, 115 La. 897, 40 So. 303 (1906).

[8, 9] In the instant case, defendant did not object to the introduction of the hearsay statements when they were made. Thus, his hearsay objection during closing argument was untimely. Furthermore, because the statements constituted evidence, his objection that the prosecutor exceeded the scope of closing argument is without merit. The trial judge did not err in overruling the objection.

Assignment of Error No. 17 is without merit.

ASSIGNMENTS OF ERROR NOS. 19 AND 20

Defendant contends the trial judge erred in overruling his objections to the prosecutor's statements in closing argument that there was hostility between defendant and Fred Schmidt, the victim, and that Michael Glover drove defendant's car to the crime scene. He claims that these statements were not supported by the evidence and hence were not within the proper scope of closing argument.

In argument to the jury, the prosecutor thought it necessary to show a motive in order to connect defendant to the armed robbery-murder if Fred Schmidt. The prosecutor stated: "How do we connect this defendant and Mike Glover to this crime? Well, in several ways: (1) motive, there was hostility between this defendant and the victim in this case." Defendant objected, claiming there was no evidence in the record of hostility. The objection was overruled, and the prosecutor continued. He then stated: "We connect him [defendant] through and by his automobile, he was seen driving-he was seen going that-a-way, driving in the passenger's side with Glover driving in his automobile by three people." Again defendant objected, claiming there was no evidence in the record to show that Glover was driving. This objection was also overruled.

[10, 11] Counsel are permitted in argument to make fair and reasonable conclusions from the facts introduced in evidence. La.Code Crim.P. art. 774; *State v. de la Beckwith*, 344 So.2d 360 (La.1977); *State v. Lockett*, 332 So.2d 443 (La.1976); *State v. Weathers*, 320 So.2d 895 (La.1975); *State v. Smith*, 257 La. 1109, 245 So.2d 327 (1971). Further, counsel may properly comment on and summarize the evidence in arguing facts. *State v. de la Beckwith, supra; State v. Luckett*, 327 So.2d 365 (La.1975).

[12] Brenda Rosenback testified that on the night of the murder, defendant and Fred Schmidt had had an argument. Furthermore, the manager's log kept by Fred Schmidt and introduced into evidence by the state stated: "Colin walked out, S.O.B." In view of this evidence, the prosecutor's statement that there was hostility between defendant and Fred Schmidt was not improper. It was a conclusion that the state could draw from the facts introduced in

[13] Three persons testified that they had seen defendant's car in the vicinity of the Red Lobster Inn, the scene of the crime, just before the armed robbery–murder. Two of them further testified that two men were in the car. One testified that one of these men was defendant. Some time after the killing, defendant and Glover arrived at their apartment and packed to leave. They left together. The killing had been accomplished with a knife similar to that carried by defendant and a handgun of the same caliber as that of Glover. In view of this evidence, the prosecutor's statement that Glover was driving the car was not improper. It was a reasonable conclusion drawn from the facts in evidence.

In sum, the trial judge did not err in overruling defendant's objections to the prosecutor's statements in closing argument that there was hostility between defendant and Fred Schmidt and that Michael Glover had been driving defendant's automobile.

Assignments of Error Nos. 19 and 20 are without merit.

ASSIGNMENT OF ERROR NO. 26

Defendant contends the trial judge erred in denying his motion in arrest of judgment grounded on the claim that La.R.S. 14:30 and La.Code Crim.P. arts. 905–905.9 are unconstitutional on their face and as applied.

First, defendant argues the use of an aggravating circumstance as an element of the crime is unconstitutional because once the jury has determined guilt it has already determined the existence of an aggravating circumstance prior to the commencement of the sentencing hearing.[2]

[14, 15] This argument is without merit. Notwithstanding the verdict rendered in the guilt portion of the trial, to determine that the sentence of death be imposed the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists after a sentencing hearing. Defendant has the opportunity to introduce evidence, including that of mitigating circumstances, not introduced at trial. The jury is not bound to find the existence of an aggravating circumstance merely because it found defendant guilty of first degree murder.

[16] La.Code Crim.P. art. 905.4(g) provides that one of the aggravating circumstances is that the "offense was committed in an especially heinous, atrocious or cruel manner." Defendant argues this provision is unconstitutionally vague and overbroad.

The argument is without merit. In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court answered a similar challenge to a Georgia provision authorizing imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" by stating: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." We have previously construed art. 905.4(g) as incorporating some idea of torture or pitiless infliction of unnecessary pain on the victim. *State v. Sonnier*, 379 So.2d 1336 (La.1979) (on original hearing); *State v. English*, 367 So.2d 815 (La.1979). Accordingly, we hold here that the aggravating circumstance of art. 905.4(g) is not unconstitutionally vague and overbroad.

[17] Defendant also argues that La. Code Crim.P. art. 905.8 accords too much discretion to the jury, resulting in arbitrary and capricious imposition of the death penalty. Article 905.8 provides:

> The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Defendant's claim is without merit. Although the trial judge must sentence the defendant in accordance with the recommendation of the jury, all discretion has not been placed with the jury. Adequate safeguards have been provided against the arbitrary imposition of the death penalty. The jury's recommendation must be based on a finding of at least one statutory aggravating circumstance and after considering any mitigating circumstances. Moreover, despite the jury's recommendation, the trial judge has the authority to grant a new trial and this court is required to review every sentence of death to determine if it is excessive.

Additionally, we note that our capital sentence law was modeled upon the Georgia statute upheld in *Gregg, supra*. That statute also bound the trial judge to sentence the defendant in accordance with the recommendation of the jury.

[18] Finally, defendant argues the sentencing provisions are unconstitutional because they allow a defendant to be sentenced to death for the type of person he is rather than for the crime he committed. Specifically, he points out that La.Code Crim.P. art. 905.2 provides that the "sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender."

This argument is without merit. Defendant cannot be sentenced to death without a finding of the existence of a statutory aggravating circumstance, no matter what type of person he is. Moreover, it has long been accepted in this country that sentencing should be done on an individual basis. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). As the United States Supreme Court concluded in *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976):

> in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

In sum, the trial judge did not err in denying defendant's motion in arrest of judgment.

Assignment of Error No. 26 is without merit.

ASSIGNMENT OF ERROR NO. 27

[19] Defendant contends the trial judge erred in denying his motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for a new trial based on the same claims. He argues he was denied assistance of counsel because he was forced to make a choice between retaining counsel and taking the stand.

The record reveals that at the beginning of the sentencing hearing, before the jury was brought into the court, defendant moved the court to discharge Neal Wilkinson, his assistant counsel. Defendant indicated he desired to retain J. J. McKenzie as chief counsel. The court granted the motion but allowed Wilkinson to remain in the court to assist in any way he could. The jury was brought in and the prosecutor made his opening statement. Defendant then moved to discharge McKenzie. The court denied the motion and told defendant McKenzie would stay in court and advise him. Defendant then asked the judge if he could take the stand. McKenzie told the judge he had advised defendant against taking the stand and requested to withdraw. The court denied counsel's request and stated defendant could take the stand. After a recess, defendant announced he agreed with counsel not to take the stand but would argue his case. In argument, defendant told the jury he wanted to be sentenced to death. McKenzie objected, defendant concluded, and McKenzie argued mitigating circumstances to the jury.

2. At the time of the commission of the instant crime, conviction of first degree murder required proof of one of four of the aggravating circumstances listed in La.Code Crim.P. art. 905.4. *State v. Payton*, 361 So.2d 866 (La. 1978). The aggravating circumstance charged and found in the guilt phase of the instant case was that defendant was engaged in the perpetration or attempted perpetration of armed robbery

We do not agree that defendant was forced to make a choice between retaining counsel and taking the stand. While McKenzie initially presented defendant with a choice between testifying or continued representation, counsel was never allowed to withdraw and in fact continued his vigorous assertion of defendant's case by repeated objections to argument by the prosecution and by presenting additional argument on defendant's behalf. Defendant was aware of his right to take the stand. The opportunity both to take the stand and to have counsel remained open at all times. The trial judge appropriately resolved the conflict between defendant and his counsel while at the same time recognizing defendant's right to testify. Accordingly, the trial judge did not err in denying defendant's motion to discharge counsel, counsel's motion to withdraw, and defendant's motion for a new trial based on the same claims.

Moreover, we note that, although defendant failed to take the stand, it appears clear from his closing argument that his sole motivation for taking the stand was to ask the jury to recommend the death sentence. This purpose having been fulfilled by his closing argument, it can hardly be argued defendant was deterred from testifying by the threat that counsel would no longer represent him.

Assignment of Error No. 27 is without merit.

SENTENCE REVIEW

Article 1, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La.Code Crim.P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La.Sup.Ct.R. 28, § 1, which provides:

Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors,

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) *Passion, prejudice or any other arbitrary factors*

[20] There is no evidence that defendant's sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. Moreover, we note both defendant and his victim are white.

(b) *Statutory aggravating circumstances*

[21, 22] The jury in its verdict found the following statutory aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery.

(b) The offense was committed in an especially heinous, atrocious or cruel manner.

Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use or force or intimidation, while armed with a dangerous weapon. In our view, the evidence amply supports the jury's finding that the defendant was engaged in the perpetration or attempted perpetration of armed robbery.

[23] The jury also found that the offense was committed in an especially heinous, atrocious or cruel manner. We have previously construed this statutory aggravating circumstance as incorporating some idea of torture or pitiless infliction of unnecessary pain on the victim. *State v. Sonnier*, 379 So.2d 1336 (La.1979) (on original hearing); *State v. English*, 367 So.2d 815 (La.1979).

In the instant case, defendant and Glover had a gun, yet they chose first to stab the back, neck, head, arms, and hands. One of these wounds was made in an attempt to stab through the victim's skull. As one of the police witnesses testified, the victim was "butchered." Accordingly, we find substantial evidence supporting the jury's finding that the murder was committed in an especially heinous, atrocious or cruel manner.

In sum, the evidence supports the jury's finding of two statutory aggravating circumstances.

(c) *Proportionality to the penalty imposed in similar cases*

[24] Supreme Court Rule 28, § 4 provides that the district attorney shall file with this court a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. In the instant case, the list reveals that there have been twenty-eight first degree murder indictments filed in East Baton Rouge Parish. In addition, we know of two others. *State v. Williams*, 383 So.2d 369 (La.1980); *State v. Spooner*, 368 So.2d 1086 (La.1979) (reversed and remanded for new trial). Fourteen of these indictments resulted in verdicts of guilty of first degree murder.[3] Of these fourteen, three defendants, including Colin Clark, received the death penalty.[4] In all of these cases, the defendants were the actual killers[5] and the killings occurred during armed robberies. Thus, in the cases most similar to defendant's, the same penalty was imposed.[6] A review of the other first degree murder convictions in East Baton Rouge Parish shows a dissimilarity between them and the instant case in that there were arguably no aggravating circumstances[7] or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.[8]

According to a presentence investigation report and the Uniform Capital Sentence Report, defendant is a twenty–six year old white male whose parents were divorced when he was eleven. His father was an alcoholic who beat him. Although of aver-

3. *State v. Clark*, No. 66,573 (instant case); *State v. Williams*, 383 So.2d 369 (La.1980); *State v. Williams*, No. 64,987, — So.2d — (La., March 3, 1980) (rehearing granted); *State v. Glover*, 380 So.2d 626 (La.1980); *State v. Allen*, 380 So.2d 28 (La.1980); *State v. Foote*, 379 So.2d 1058 (La.1980); *State v. Collins*, 378 So.2d 928 (La.1979); *State v. Howard*, 377 So.2d 1226 (La.1979); *State v. Gertenschloger*, 377 So.2d 130 (La.1979); *State v. Edwards*, 375 So.2d 1365 (La.1979) (remanded for further proceedings); *State v. Spooner*, 368 So.2d 1086 (La.1979) (reversed and remanded for new trial); *State v. Holmes*, No. 65,846 (La., filed Oct. 9, 1979); *State v. Fitzpatrick*, No. 66,770 (La., filed Feb. 6, 1980); *State v. Gleim*, No. 3–79–344 (La. 19th Jud.Dist.Ct., filed Jan. 31, 1980).

4. The two other cases in which the death penalty was imposed are *State v. Williams*, 383 So.2d 369 (La.1980), and *State v. Williams*, No. 64,987, — So.2d — (La., March 3, 1980) (rehearing granted).

5. Although both Michael Glover, *State v. Glover*, 380 So.2d 626 (La.1980), and Ralph Holmes, Jr., *State v. Holmes*, No. 65,846 (La., filed Oct. 9, 1979), were parties to the same killings as were Colin Clark and Robert W. However, neither was the actual killer in their respective crimes.

6. In *State v. Edwards*, 375 So.2d 1365 (La.1979) (remanded for further proceedings), defendant was the murderer and the killing occurred during an armed robbery. Defendant was sentenced to life imprisonment. There, however, defendant was seventeen years old; hence, it is possible the jury found sufficient mitigation to recommend life imprisonment rather than death.

7. *State v. Allen*, 380 So.2d 28 (La.1980); *State v. Foote*, 379 So.2d 1058 (La.1980); *State v. Collins*, 378 So.2d 928 (La.1979); *State v. Gertenschloger*, 377 So.2d 130 (La.1979); *State v. Spooner*, 368 So.2d 1086 (La.1979) (reversed and remanded for new trial); *State v. Gleim*, No. 3–79–344 (La. 19th Jud.Dist.Ct., filed Jan. 31, 1980).

8. *State v. Glover*, 380 So.2d 626 (La.1980); *State v. Howard*, 377 So.2d 1226 (La.1979); *State v. Edwards*, 375 So.2d 1365 (La.1979) (remanded for further proceedings); *State v. Holmes*, No. 65,846 (La., filed Oct. 9, 1979);

the tenth grade. He admitted that he started taking drugs when he was fourteen. He is divorced and has no children. Defendant's record consists of juvenile arrests involving drugs and trespassing and criminal convictions for distribution of drugs, driving while intoxicated, obstructing an officer and driving violations. His arrest in California for a drug violation led to his return to Louisiana to stand trial on the instant charge.

After having considered the above factors, we are unable to conclude that the sentence imposed in the instant case is disproportionate to the penalty imposed in other cases, considering both the crime and the defendant.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed.

DIXON, C. J., especially concurs, not agreeing that conspiracy charge was proper, but believing it was not prejudicial.

DENNIS, J., concurs in part and dissents in part with reasons. [Editor's note: The concurring and dissenting opinion was not filed in time to permit publication with the opinion of the court; it will be separately published.]

CALOGERO, J., dissents and assigns reasons.

CALOGERO, Justice, dissenting.

I respectfully dissent from the majority's affirmance of the conviction and sentence of this defendant because I do not believe the majority's treatment of the conspiracy issue is correct. Rather I believe defendant's assignment of error No. 13 has merit.

Initially, the state did not establish a prima facie case of conspiracy, a mandatory requirement prior to charging the jury on the law pertaining to conspiracy. In the evidence presented at trial there was no showing that Clark was engaged in a conspiracy to rob or to murder. There was evidence that Clark's vehicle was seen within one hour prior to the time the burglar alarm sounded, with two occupants. There was further evidence that Clark was seen three hours after the murder with Glover, that Clark and Glover were packing their things to leave town and that Glover had a large number of bills in his wallet. This evidence hardly constitutes a prima facie showing of conspiracy to rob or murder.

Criminal conspiracy is defined as "the agreement or combination of two or more persons for the specific purpose of committing any crime . . . ." R.S. 14:26. This Court has held on numerous occasions that when the only indication of conspiracy is that two people committed a crime, and there is no showing that defendant either committed or conspired to commit the criminal act, no prima facie showing of conspiracy has been established. *State v. Matthews*, 354 So.2d 552 (La.1978); *State v. Sheppard*, 350 So.2d 615 (La.1977); *State v. Bennett*, 341 So.2d 847 (La.1976); *State v. Kaufman*, 331 So.2d 16 (La.1975) and *State v. Carter*, 326 So.2d 848 (La.1975).

In the present case, there has been no showing that defendant conspired with anyone to commit any crime. Unlike the cases above, all of the evidence, other than the fact that two passengers were seen in defendant's car an hour before the crime, concerns the defendant's activities three hours after the crime. There is simply no showing that the defendant and/or any other person agreed or combined to commit this crime.

Without making a prima facie showing of conspiracy, the state can not take advantage of R.S. 15:455, which makes a defendant who is part of a conspiracy bound by the acts and declarations of a co-conspirator if they are done in furtherance of the conspiracy. Without the advantages of this provision, for a first degree murder conviction the state must prove, by independent evidence, that defendant both killed the victim with the specific intent to kill and did so in the course of an armed robbery. *State v. Payton*, 361 So.2d 866 (La.1978). In the present case, the state did not make a prima facie showing of conspiracy and, therefore, the charge on R.S. 15:455 should never have been given.

Since we can not now determine whether the jury, under R.S. 15:455, mistakenly attributed the acts of the other party to this defendant or found independently that defendant had himself committed the requisite elements of the crime of first degree murder, I believe that defendant's conviction and sentence should be reversed and the case remanded for a new trial.

WEST KEY NUMBER SYSTEM

LOUISIANA STATE BAR ASSOCIATION

v.

Robert D. EDWARDS.

No. 60211.

Supreme Court of Louisiana.

June 23, 1980.

On Rehearing Sept. 10, 1980.

Committee on Professional Responsibility of State Bar Association brought a disciplinary proceeding. The Supreme Court, Dennis, J., held that simulated transactions, including a sham foreclosure suit, instituted because client's wife had threatened to file suit claiming an interest in property owned solely by client purely to harass client, warrant reprimand, in light of undue delay in prosecution and lengthy suspension for contemporaneous violation.

Public reprimand ordered.

1. Attorney and Client ⇐38

Where client's wife had no interest in his separate property, and simulated transactions, including sham foreclosure suit, were instituted only because client's wife had threatened to file suit claiming an interest in property purely to harass husband, would constitute fraud upon a tribunal, knowingly creating and using false evidence, and knowingly making a false statement of fact in violation of disciplinary rules, warranting reprimand in light of undue delay in prosecution and lengthy suspension for contemporaneous violation. Code of Professional Responsibility, DR7-102(A)(4-6, 8), LSA-R.S. following 37:218.

2. Attorney and Client ⇐38, 58

Institution of sham foreclosure suit against client's property in which client's wife had no interest, after wife had threatened suit claiming an interest in property purely to harass husband, would constitute fraud upon a tribunal, knowingly creating and using false evidence, and knowingly making a false statement of fact in violation of disciplinary rules, warranting reprimand in light of undue delay in prosecution and lengthy suspension for contemporaneous violation. Code of Professional Responsibility, DR7-102(A)(4-6, 8), LSA-R.S. following 37:218.

3. Attorney and Client ⇐46

Attorney could not invoke doctrine of laches to prevent disciplinary action, though there was delay of almost four years between time complaint was filed and time suit was instituted in Supreme Court, where attorney was not prejudiced in defending against the charges by the delay.

On Application for Rehearing

4. Attorney and Client ⇐59

Where public reprimand was order of attorney, costs of disciplinary proceeding before Supreme Court would be assessed to attorney.

Thomas O. Collins, Jr., Executive Counsel, New Orleans, Harold J. Lamy, New Orleans, Roland J. Achee, Shreveport, Wood Brown, III, New Orleans, Sam J. D'Amico, Baton Rouge, Leonard Fuhrer, Alexandria, Edgar H. Lancaster, Jr., Tallulah, Alfred S. Landry, New Iberia, A. Russell Roberts, Metairie, John B. Scofield, Lake Charles, for applicant, Louisiana State Bar Ass'n.

Milton P. Macister, New Orleans,